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MULTIPLE JURISDICTION IN STATUTORY CONSPIRACY.

As common law the crime of conspracy needed no overt act to become an indictable offense. Evidence of overt acts could be given, however, as tending to prove the conspiracy itself. Also it has been said that they might show a conspiracy was a continuing offense or there had been a renewal. And it seems that all who participated in an overt act at another place than its original formation could there be indicted on the principle of the offense being there renewed.

Statutory conspiracy generally requires that merely conspiracy to do an unlawful thing is impotent to constitute a crime unless it is followed by an overt act. This distinction between common law and statutory conspiracy finds its most prominent illustration in the federal statute in regard to this crime. After it has kept the lower federal courts in conflict for many years on questions of venue and statute of limitations, the controversy about venue, that is to say, whether there is a double, triple or many fold venue or only a single venue, winds up in the supreme court on a vote of five to four ruling the former. Hyde v. United States, 32 Sup. Ct. 793.

Mr. Justice McKenna writes the majority, and Mr. Justice Holmes, the dissenting, opinion. The former opinion seems to us to refute itself as it proceeds, and the latter, well observes that: "I (he) can think of no other case in which it would be argued that an act constituting no part of the crime charged draws jurisdiction to the place where it is done." In this he merely regards overt act as evidence of the conspiracy, and it is certain that it is only because of conspiracy that the overt act becomes in any way objectionable.

Justice McKenna seems to us to go upon the theory that statutory conspiracy enlarges or extends common law conspiracy, when the reverse is true. The common law offense was something like misprision of treason. It searched the heart, while under statutory conspiracy the heart may be as malevolent openly or secretly as it pleases and the law takes no account of it.

Under statute intent to defraud may be preached from the house-top and this, if thought better, for the purpose of making an overt act bear fruit, but, if the overt act is never committed, it goes free. But at common law it must skulk or stand the hazard of being indicted. The overt act is needed in the one case to help prove the crime; in the other, to make it indictable.

Thus Justice McKenna says: "The guilty purpose must be put into the guilty act," as to which all agree as to statutory conspiracy, if adjectives may be disregarded. But when he admits as prior cases he cites show, that conspiracy is the gist of the offense, he goes to an extraordinary length in saying there is a constructive criminal presence wherever an overt act is performed, howsoever remote in time or place, within, we may say, the limits of federal territory and the statutes of limitation.

Mr. Justice Woods thought that between the time of entering into a conspiracy and the commission of an overt act there was a *locus pœnitentiæ*. U. S. v. Britton, 108 U. S. 204. And Judge Sanborn evolved from this quite correctly, we think, that there must be a conscious participation in the overt act. Ware v. U. S., 154 Fed. 577, 84 C. C. A. 503, 16 L. R. A. (N. S.) 1053. But Justice McKenna assumes for jurisdictional purposes that one who says he is going to complete a crime is not going to repent and, if some one of the embryo conspirators commits an act, which at common law would be an overt act, by statute it is part of a criminal act by all.

That ruling is not only harsh, but it is beyond, it seems to us, the power of Congress to declare. Congress has nothing whatever to do with the moral quality of a

man's act. That is in the domain of state law. Congress is the custodian of certain powers for the benefit of states and may punish as it pleases any one who interferes with its functions. When it talks of misdemeanors and felonies it assumes for its convenience state classification. As Justice Holmes says, not pointing the remark, however, as we here attempt: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

Now, having this theory of power, could Congress say that a man may commit one crime in two different places simultaneously? In this case defendants entered into a conspiracy in California, there to defraud the government of land, and committed overt acts at the General Land Office in Washington. They were indicted in Washington, though they were never personally there. It was contended they could only be indicted in California, and the court proceeds on the theory, that they could be there indicted.

It might well be conceded that, had the defendants gone to Washington and there committed the overt acts, they could be there indicted on the theory of their renewing the conspiracy at a new venue. But the conspiracy, as a renewed conspiracy, would not be indictable anywhere else.

When, however, only constructive presence is relied on, this extends the idea about a presence being so near at hand as to facilitate or aid in the perpetration of crime. Indeed, we might say, it is calling another thing constructive presence than what the law has considered that to be.

As showing that overt act does not create venue, the supreme court says: "We have ourselves decided, that, if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will be there, though the overt act is shown to have been committed in another jurisdiction or even in a foreign country." Hyde v. Shine, 199 U. S. 62.

This means, as we take it, that though it may be necessary for an overt act to follow, yet it is sufficient if the overt act be committed in a foreign country. Over it, then, as a crime the United States would have no jurisdiction whatever. It makes the conspiracy, then, indictable, because it becomes indictable by reason of a circumstance that may not be a criminal act or possess any offensiveness at law.

We confess it seems a bad mixture to say an overt act need not be criminal at all, and yet it may be part and parcel of a criminal act. What good would it do to give these defendants a constructive presence in Canada? None whatever. But arguing for its necessity would be arguing United States courts out of jurisdiction. Here it is argued to sustain jurisdiction.

"Constructive presence" thousands of miles away evolved from a statute supposed to be in mitigation of the rule of conspiracy at common law is a development, that, at least, may be regarded with surprise. For further discussion of overt acts in statutory conspiracy we refer to 71 Cent. L. J. 387.

NOTES OF IMPORTANT DECISIONS.

SALES—LIABILITY OF MERCHANTS AS TO ARTICLES OF EXPLOSIVE CHARACTER.—The case of Peaslee-Gaulbert Co. v. McMath, 146 S. W. 770, decided by Kentucky Court of Appeals, contains a very elaborate discussion regarding the liability of dealers in selling in the open market articles of merchandise potentially dangerous in their use by the ultimate purchaser.

The facts show, that a wholesale company sold to a retailer a can of paint dryer known as No. 1 T. Japan Dryer. This dryer was highly inflammable, but would not explode unless touched by or in very close proximity to a flame. Decedent, who was in the employ of the retail firm, went to their store at night in company with another employee and while some of the dryer was being poured from the can in which it was shipped into another can, it came in contact with the flame of a candle held too close. An explosion resulted, causing his death. His administrator sued the wholesaler, alleging as negligence its failure

to tag or mark the compound as dangerous. There was a verdict for plaintiff and this the Court of Appeals sets aside in a reversal of the lower court.

The court lays down several propositions: (1) A dealer, wholesale or retail, or any person making a sale knowing that an article is imminently dangerous in the use for which it is intended, should label or mark the package so as to indicate this fact; (2) but not so knowing he is under no duty to exercise care to discover such fact, when selling in the usual course of trade; and (3) at all events he is responsible to any person with whom he has no contractual relation unless an article is imminently and inherently dangerous in the ordinary use for which it is intended or to which it is reasonably expected to be applied.

The court distinguishes between a manufacturer and a dealer, holding the former to a higher degree of care, in putting on the market a dangerous compound, as he is presumed to know, or should be charged with notice of, danger in its use.

The court dwelt somewhat on the facts in the case at bar, this being an article of well-known consumption and there being in its proper use, with reasonable care, no danger, and the fact that this kind of a dryer, made after a somewhat universal formula, had never been sold with any label or mark indicative of the presence of any dangerous quality.

It, certainly, would be placing a very heavy charge upon merchants to make any stringent rule of liability as to merchandise not inherently dangerous in use. They ought, in the absence at least of statute on the subject, to be allowed to rely on the labels the manufacturer uses—or at least to some extent,—unless to be a merchant one should have to qualify as another would to be a druggist or a physician. The fact that the police power of the state does not require this is a presumption that a seller, in open market, of merchandise and his buyer are presumed to have equal knowledge in matters of this kind. We refer in this connection to 74 Cent. L. J. 277, where was discussed editorially, "Liability of Wholesaler of Toy Pistols for Death of Child Purchasing from Retailer."

INTOXICATING LIQUORS — ORDINANCE PROHIBITING SALOONKEEPER FROM PERMITTING TREATING.—Police power is a wonderful and a mysterious thing. Under it an ordinance which exhausted itself in making a saloon-keeper liable for permitting "treating" in his saloon and leaving treater and treatee to go unwhipped of justice was held by Washington Supreme Court to be both reasonable and constitutional. City of Tacoma v. Keisel, 124 Pac. 137.

The court said: "It is finally contended that this ordinance is in violation of those provisions of the Federal and State Constitutions which secure to the citizen his property, except as he may be deprived thereof by due process of law, and which guarantee to him the equal protection of the laws. The argument advanced is, in substance, that the offense defined by this ordinance in order to be committed must be participated in by the purchaser as well as the seller, and that while the seller is to be punished therefor the purchaser is not. This is an argument that might be made against a great many laws and ordinances which prohibit the selling of intoxicating liquor and other commodities, except upon certain conditions, and which punish only the seller, when violated by him. No authority has been called to our attention holding that such laws are in violation of the Federal or State Constitutional provisions here invoked. Indeed, the act of selling and the act of buying are not in contemplation of law the same act; hence it is not a case of making an act a crime when performed by one person and not a crime when performed by another. We think appellant cannot rightfully complain upon constitutional grounds, because he alone may be punished under the ordinance."

It may be technically true as the court says about buying and selling and a statute making one a violator and the other not, but is it within reasonableness for an ordinance to level its penalty against some or one participating in a disorderly act and excusing the others? Treating is the offense. The treater commits it, and the saloon-keeper permits it on his premises. Indeed he may not know there is a treating, until one offers to pay for two or more, and even that fact may not fully apprize him. It is not reasonable to charge any one with an offense he may not know he is committing. While liquor may be made all kinds of an outlaw, and the police power has the widest sweep, either as prohibiting or regulating its disposition, fanciful penalties may not be aimed at one violator and omitted as to another merely under claim of preserving peace and order—especially when this is attempted by a municipality which has other limitations for its enactments than obtain as to statutes.

QUESTIONED INK MARKS—HUMAN DYNAMOGRAMS.*

Where the determination of a litigated ness or falsity of a given handwriting, we are accustomed to hearing witnesses "acquainted" with the writing of the person state their beliefs on the subject; yet the witnesses are unable to give any clear reasons for their opinions, and—where they are not allowed to also acquaint themselves with the tenor of the document, or with its surrounding circumstances—they are at once thrown into confusion.

This is because such witnesses rely on the probabilities of the occurrence of the transaction involved, rather than on the chirography of the document the latter has no bearing on their judgment, if there is an resemblance, in the general pictorial effect, between the writing in question and that not disputed. Therefore (as to penmanship alone), all that is necessary, in order to make a writing pass current as genuine, with such witnesses, is that its pictorial forms shall show a general resemblance to the undisputed writing.

It is quite possible for a trained hand to copy more or less closely this mere picture of another person's writing; if the copyist is sufficiently skilled to do this freely and without undue hesitation—and if the transaction itself seems probable—his efforts will be likely to be accepted in good faith by such ordinary lay witnesses, and also by such witnesses as writing teachers, engrossers, and bank tellers. In fact, any one who relies on mere pictorial effects, could be so deceived. So convinced of this is the author, that notwithstanding he has devoted many years to the scientific examination and testing of questioned documents, he would not identify even what purported to be his own signature, unless he either had a recollection or record of the transaction, or had made a suitable microscopic test of the writing.

Line Analysis.—The evident futility of relying on such things as are at once apparent to a casual observer's naked eyes, turned the writer's mind to the investigation of more minute, yet more important, data by which to settle such questions. As a result, he directed his attention to ascertaining the inherent characteristics of a mere stroke of a pen, regardless of form and smallness;—in other words, to line analysis; one branch of this investigation involved the character of the mere *edging of a mark.*

At the time, the writer was unaware of any one else working along such paths of investigation; he proceeded with the work, and finally was able to make practical use of it, in a case in which he was engaged in the summer of 1898. In 1900 (in a case in which both were engaged, and to their mutual surprise) the writer learned for the first time that another expert—Dr. Frazer—had also been studying for a short time along somewhat similar lines, and that he coincided with the author in the opinion that therein lay a most important factor for determining such matters.

Since 1898, the author has carried on his independent investigations unceasingly, and has used such tests in his practice, with the most satisfactory results. His investigations have been continued to a point beyond those of Dr. Frazer, and along wider lines; and such of the results as are herein embodied (with the exception of the main idea) are now published for the first time.

Dynamograms.—The phenomena are microscopic in size, are wholly involuntary on the part of the person causing them, and absolutely beyond his control; they are simply involuntary and unavoidable products of the living machinery of his organism—seemingly, of the ceaseless and automatic dynamic action of his life forces—wherefore they may appropriately be termed *dynamograms.*

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Two well-known mechanical phenomena will serve to illustrate the character of these dynamograms:—

Although the earth is constantly in rapid motion along its orbit, the delicate seismograph makes no record thereof; but let there be any vibration or pulsation of its internal organism, affecting the outer crust of the earth itself, and the seismographic point will at once automatically record the fact, and the extent of the disturbance, by a more or less crooked line drawn by a marking point along the record sheet; this irregular wavering line often roughly resembles the serrated edge of a pen stroke.

Again, when a person enters a building in which heavy machinery is being operated, he can feel more or less vibration of the building, although (to his eye) the building is standing perfectly still and immovable. As long as the machinery is running, there will be this vibration or rocking back and forth; if he attempted to take a photograph by a time exposure made in that building, it would be impossible for him to obtain sharp definition in the picture, because the outlines would be jarred back and forth slightly from their proper regular positions, by the rhythmic vibration of the machinery.

So, with a human being. As long as he is alive, his systemal action is going on, whether his body be moving about or not; the physical functions involved in his mere living existence never cease their more or less rhythmical action. The result is a peculiar species of vibratory action and force, which, when applied to an inked point held in the hand, produces characteristic irregular edges along any stroke made with the instrument.

But we are not herein concerned so much with the *cause* of this phenomenon, as with the *character* of its resulting dynamogram.

Difficulties and Uses.—As the value of a dynamogram is based upon its rough edges, and as every inked line—whether made by a living person, or by an inanimate machine—is more or less rough under great magnification, it is, of course, difficult for the uninitiated to distinguish one roughness from another roughness.

Yet every roughness has its own individual characteristics; in certain cases these characteristics afford an invaluable means of identification of the human maker of a stroke or mark; in other cases, they furnish us with the means to distinguish that which is really a dynamogram from that which is not a dynamogram at all, but a mere physical accident; in still other cases, they enable us to determine the character of instrument or process used in producing the mark; and finally, in yet other cases, they give us the data from which to learn the manner in which the marking instrument or process was used.

Criticisms.—When the writer first began to make practical use of line analysis, ignorance and fallacious reasoning combined to produce criticisms as to its value.

For instance, it was urged that *all* written lines have rough edges, and that therefore no conclusion could be based on such roughness! If such lines were *not* all rough, then there would be no foundation upon which to rest the present article.

It was also urged that the roughness of the line was due to the roughness of the paper or other writing surface. That this is not only false, but preposterous, with respect to the roughness herein considered, is evident from three facts: (a) Observations made of lines on a series of entirely differently surfaced papers—rough, smooth, glazed, unglazed, coated, uncoated, harder, and softer—as well as on other surfaces, all show similar characteristics, when made by the same person. (b) The microscope brings out the individual paper fibres, as well as the serrations of the edges of the written mark, and shows that a greater or less number of serrations may be found in the crossing of a single paper fibre. (c) The serrations rarely average fewer than 500 to the inch of line, and often run up to 2500 to the inch—or even higher.

It has been further said, that the mere mechanical act of making a stroke or mark

is not a factor of significance in the production of the ragged line-edges; and as evidence thereof, it was claimed that the serrations were not visible, when a stroke with a pen was made in a bed of wax laid on a sheet of glass. In legal phraseology, the proof offered is "wholly irrelevant and incompetent," as it fails to take into account either the fact of the extreme minuteness of the serration phenomenon and the wonderful delicacy of the dynamic action producing it, or the fact that ordinary handwriting is done with a very mobile fluid distributed by one or more delicate points. For these very sensitive conditions of writing, there was substituted a solid mass of inert wax, through which the pen was forced, and which practically precluded the possibility of a phenomenon as delicate as that in question.

Then it has been objected that the dynamograms would be worthless, because a person's physical condition varies from time to time, and there would be entirely different demonstrations in the writing of the same person, in such changed conditions of health, etc., on different occasions. This sounds reasonable, but the facts are against such a theory. The writer has been able to cover periods of as long as 40 years of a given person's life, which included every condition of physical and mental strength and weakness; during the changing conditions of this long period, the *intensity* of the action would sometimes vary slightly, but the *characteristic type* of the dynamogram remained the same, and was therefore completely individuated and identified.

Finally, it has been urged that the dynamograms furnished no *intelligible* data. Of course, in this matter, as in all others of any degree of newness or complexity, the entire subject will be (in a sense) unintelligible to a person, till he gives it that diligent study which will enable him to understand it. The proper study of the phenomena, followed by experience, clearly brings out their significant points.

Fitness Established. — Notwithstanding these criticisms, the species of line analysis herein set forth has "stood the test of time," and its general utility and great importance have been fully demonstrated, and are now generally conceded, wherever prejudice is not enthroned on the seat of judgment. Not the least of its claims for recognition are based on what may be termed the spontaneity of the phenomena;—on the physical impossibility of their simulation by a would-be copyist;—on their persistent unchanging types for long periods of years;—and on their independence of surrounding circumstances and conditions, whether outside of, or within, the body of the writer. It only remains for the phenomena to become fully understood.

The author's fourteen years of investigation of this particular subject have provided him with a vast amount of data, which (on being reviewed and analyzed) have been found to be rich mines of information; many general rules have been discovered, and many startling surprises have been encountered. Some of the more important principles so laid bare, are set forth herein, so that those who follow after the author will at least be spared the necessity of much of the preliminary drudgery of such an investigation into what was—and in some respects still is—a new field of science.

Mechanical Conditions.—It may be gathered, from what has already been said, that, in order to produce a dynamogram, the combination of *recording instruments* must be sufficiently sensitive to be responsive to the delicate dynamic action of the user's body. That is to say, the marking point must be a small one readily capable of free movement; then (according to the latest data of the investigation) the point must carry a marking fluid; and finally, the recording surface must be such as will permit of the free movement of the point by the dynamic action. Furthermore, in order to make the dynamogram of value for purposes of observation, the recording surface must be such as will allow of a distinct marking of the record, and of its continuance in a distinct form—for instance, it *must not blur.*

Partial Exceptions.—Where no marking

fluid is used, the resultant mark (according to the latest experience) does not possess the non-fluctuating and individuated characteristics of a dynamogram; but such mark does exhibit certain phenomena quite valuable in determining other questions about it. The non-fluid records will be only touched on incidentally, in this paper, and be reserved for full treatment separately hereafter.

Methods of Observation.—For the purposes of the present analysis, a comparatively low magnification is believed to be most suitable; the writer uses powers of not over 100 diameters, as meeting all ordinary requirements.

It is, of course, necessary to bring out clearly every pronouncedly *positive* lateral movement due to dynamic action; it is equally necessary to avoid aberrations that are so slight as to prevent easy observation of variations in their *intensity* at moderate magnification. It must always be remembered, that ordinary writing instruments are constructed simply with a view to their fitness for the easy production of more or less gross marks; they are not adapted especially for the most sensitive registrars of the most delicate dynamic impulses.

In making observations of lines, only *down strokes* should be used; and of these, such only should be taken as are practically *parallel with the writing point*—that is, such as have the same angle of lateral slant to the base line of writing as has the writing point. Having found a suitable stroke, a field of observation should be selected therefrom, which exhibits distinctness of outline. These are of course ideal conditions of examinations; where they cannot be had, the observer must apply the legal doctrine of *"cy pres,"* which, with sufficient experience and skill, will give him the desired data.

For comparing data, the observations ought to be taken from strokes substantially similar in their relation to the angle of the writing point, as already explained.

Having thus located suitable fields of observation, the next step is to select a number of them of as much variety as possible, in the conditions surrounding their production—*e. g.*, of different dates and writing surfaces; the selected specimens are then to be subjected to the proper magnification, and accurate records made of every enlarged image. These records will (if properly selected and made) give the observer a series of charts representing the dynamic action of the individual penman, covering the widest possible range of variations, and all possible fluctuations.

Resultant Dynamograms.—These dynamograms will contain within themselves, not the "finger prints" of the person whose records they are, but more nearly his "life-force prints;" it is for the experienced observer to study them thoroughly, and to discover from them the fixed, individual type belonging to the ego making the marks.

That which, in the natural sized original, looked like a smooth and well-defined line of uniform opaque color, when so magnified, appears like an enormous translucent band of mottled colors, with more or less fantastically frayed or frazzled edges; its body presents much the same appearance as a roadway made of loose sticks and stones, over which some colored liquid has been carelessly poured.

Study of Dynamograms. — Particular study must be given to two features of the dynamogram. *First,* The general pictorial effect of its outline, which the author terms its character and *Second,* The relative numbers of separate and independent impulses occurring in the respective margins of a given section of dynamogram.

Their Character.—Considering the first *Character* of the dynamogram—the grosser of the features—it will be found that the two sides of the mark are never exactly alike;—that they may be cloudy and ill defined, or distinctly marked;—that a single edge may show many or few, large or small, angular or rounded, pointed or flattened, even or uneven, mixed or uniform, as well as many other classifications of, irregularities;—that the irregularities may occur constantly, or only intermittently;—that they may occur, as it were, in unison on both

edges at the same time, or alternately first on one edge and then on the other;—that the irregularities may preponderate in prominence on one edge, or on the other edge;—and so on, through all manner of different characteristic appearances.

Slight fluctuations in minor details of character may occur in the dynamograms of the same person (especially with the use of different writing points) yet the general type will remain substantially the same: there will be but little difference even between the right and left hand-work of the same person. The type will be more or less affected, however, should the element of a "guiding hand" of another person be introduced; then, too, the type will vary for persons of different temperament.

Their Numbers and Relationship.—Now, taking up the matter of *Relative Numbers* of impulses, as represented by the indentations and serrations of the marginal edges of the dynamograms, an entirely different situation is presented.

The first step is to take as large a cross-section of the dynamogram as it is possible to get, and then to count (with unaided vision) all the serrations on each side of the stroke within the limits of the section, and to make a separate record for each side; then do likewise with similar cross sections of all the other dynamograms of the same person, and compare the results.

If the dynamograms were made with a pen of the ordinary double-nib variety, inked so as to cover between the nibs, it will be found that some sort of fixed relation (depending on the individuality of the person so writing) will exist between the average number of serrations on one side of the strokes, and the average number on the other side thereof. No such constant relationship, however, exists in records made with a single point, such as a stylus or stylographic pen; and the Author has, as yet, been unable to find any fixed relationship where the records were made with a double point carrying insufficient ink to connect the two nib marks, in which case each separate nib seems to act like a stylus.

Before considering the relationship of the serrations on the two sides of a dynamogram, it is well to note that the stroke may have been made with the right hand, or with the left hand, or it may have been the product of a guided hand. In the last case the qualities of *both* hands will be embodied in the mark, in the proportion of the influence exerted by *each* in the operation. In the other two cases there are certain differences usually found:—1st. There is generally a reversal of the pen angle, pen plane, and nib pressure; such changes are almost mechanical necessities. 2d. Where a "right-handed" person writes with his left hand, or *vice versa,* as between the two hands of that person there is usually a difference in the neuro-muscular action, which causes those hands to be recording instruments of unlike susceptibility and sensitiveness; therefore the dynamograms of the two hands will generally be found more or less different. But where records made by the *accustomed* hand of one person are compared with records made by the *accustomed* hand of another person, the distinction between mere right and left-hand work need not be considered, as it does not apply.

The ratio types of serrations, etc., may be divided into four general classes: (a) Where the excess is on the left side; (b) Where the two sides are even; (c) Where the excess is on the right side; and (d) Where there is a duplex type—*i. e.,* sometimes with excess on the left, and sometimes on the right, side.

According to the writer's experience, where there is an excess on one side or the other, it is but fractional; it has been exceedingly rare for him to find ratios showing greater differences than 3:2. But whatever the ratio type may be, and whatever the degree of difference between the sides may be, it is established, by an overwhelming mass of data, that neither type nor difference follows, or depends upon, the angle, plane or pressure, of the writing point, or the particular accustomed hand used. And further, the dynamograms produced by the same hand of the same

person do not ordinarily vary more than 3 per cent in such ratios.

The mere mention of ratio-type (b) shows that *different* persons may produce dynamograms exhibiting exactly similar *ratios;* yet the author's experience has been that, out of the entire number of persons covered by his years of investigation, the members of any one such group were not over 3 per cent. of the whole body.

Mere identity of *ratio,* therefore, would be an unlikely occurrence in any single investigation, even if it constituted a serious stumbling block. Fortunately, however, it is of little practical importance, because in no single such instance, has there also been found an identity in the other elements entering into the same dynamograms.

In no case, where the ratios of serrations of different writers agreed, were those same writers also alike (for nearly alike) in the *actual average numbers* of their serrations, and the *character* of their dynamograms (as already explained), and in the angle, plane, elevation and pressure of their writing points; neither were they also in accord in their hand and arm movements and other methods of writing, and in the numerous other conscious and unconscious, physical and nervous, peculiarities, combining together to constitute their respective "handwritings;" nor were they also of identical temperaments, as disclosed by those several handwritings.

Another important result of the author's investigations in Line Analysis has been, that, through records taken like the foregoing, a valuable means is afforded to solve many other questions affecting documents. It can be learned whether or not the mark is *handwriting* at all, and with what *kind of instrument* it was made—as was done in a case involving a million dollar estate, where it was found that an ink signature had been made with a hand stamp. But that is another subject, too broad for consideration here, and will be given separate treatment.

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SALES—PURCHASE FOR UNLAWFUL USE.

ASHFORD et al. v. MACE.

Supreme Court of Arkansas, March 11, 1912.

146 S. W. 474.

Mere knowledge by a seller that the buyer intends an unlawful use of the goods sold, such as the keeping of a bawdyhouse, will not bar recovery of the price, but, if the seller actively participates in the unlawful purpose, he cannot recover; but it would be otherwise if the commodity sold is intended to the knowledge of the seller, to be used to commit murder, treason, or other heinous felony.

WOOD, J.: The question presented by this appeal is whether or not mere knowledge on the part of a lessor that his lessee intended to sublet the premises leased for the purpose of running a bawdyhouse would render the contract or lease void. In the case of O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. 527, liquor was sold with knowledge on the part of the seller that the liquor would be resold in violation of the law, and under circumstances which showed that the seller intended that it should be resold. This court, speaking through Judge Cockrill, said: "Mere knowledge by the vendor that liquor is to be resold in violation of the statute, without a participation in the illegal act, will not vitiate the sales he may make to the intended dealers; but if the vendor designedly contributes to the scheme, or is to derive a benefit from it, or if there is a unity of purpose between him and the party to be supplied, he is infected with the latter's criminality, and the contract is void."

(1) In Anheuser-Busch Brewing Association v. Mason, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580, the court, after referring to the cases of Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132, and Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, said: "These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale, yet, if in any way the former aids the latter in his unlawful design to violate a law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design, but positive acts in aid of the unlawful purpose are sufficient, though slight." Continuing, the court said: "While it is certain that a contract is void when it is illegal or immoral, it

is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes. The American text-writers generally admit this to be the prevailing rule of law in the states upon this point."

There is an exception to the rule in cases where the seller knows that the commodity sold is intended to be used by the buyer "in flagrant violation of the fundamental rights of man or of society as in cases of murder, treason, or other heinous felonies that are malum in se." See Steele v. Curle, 4 Dana (Ky.) 381; Anheuser-Busch Brewing Association v. Mason, supra; Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439; Milner v. Patton, 49 Ala. 423; Lewis v. Latham, 74 N. C. 283; Bickel v. Sheets, 24 Ind. 1. In the cases of Tatum v. Kelley, 25 Ark. 209, 94 Am. Dec. 717, Ruddell v. Landers, 25 Ark. 238, 94 Am. Dec. 719, and McMurtry v. Ramsey, 25 Ark. 350, the court held that the payee in a note given for the purchase of articles to be used in the war between the states, who knew at the time the articles were to be used in aid of the Confederate states, could not recover. These decisions were based upon the ground that the buyer was engaged in rebellion, which was treason, against the government, and that, therefore, the seller, knowing of these facts, concurred with and actively promoted the treasonable purpose of the buyer. From the viewpoint of the judges who then constituted the court and who participated in and rendered these opinions, it was treason against the government to sell articles to be used by the Confederate army. Hence those cases came within the exception to the general rule. But in the later cases this court, while citing these decisions in 25th Arkansas, nevertheless refused to follow them in cases similar to the one under consideration.

While the keeping of bawdyhouses, on account of its corrupting influence upon public morals and its detrimental effects upon society, has been denounced in the jurisprudence of civilized nations as a common nuisance, a flagrant misdemeanor, nevertheless it has not heretofore been classified by lawmakers and law-writers among the heinous felonies such as treason, murder, rape, etc. 3 Coke, Ins. 205; 1 Bish. Cr. La. 1083—3; 1 Russell on Crimes, 299; 4 Blk. Com. 1671; Rex v. Higginson, 2 Barr 1232; Rex v. Rogier, 2 D. & R. 431; 1 Wharton, Cr. Law, § 1449. Hence it is within the rule, and not the exception mentioned above. In the case of Hollenberg Music Co. v. Berry, 85 Ark. 11, 106 S. W. 1172, 122 Am. St. Rep. 17, where the seller knew that it was the intention of the buyer to use the article purchased in a house of prostitution, this court cited all the former cases, but followed the rule announced by Chief Justice Cockrill in O'Bryan v. Fitzpatrick, supra, and said: "The rule supported by the weight of authority and approved by this court is that, though the contract is entered into by one of the parties for the furtherance of an illegal purpose, the contract will not be rendered illegal as to the other party, though he had knowledge of such illegal purpose, provided he does nothing in furtherance thereof." Again, in Belmont v. Jones House Furnishing Co., 94 Ark. 96, 125 S. W. 651, 140 Am. St. Rep. 112, the same rule is recognized and adhered to.

(2) The instant case cannot be distinguished in reason and principle from the latter cases. The lower court in its admission and exclusion of evidence, and in the giving and refusing of prayers for instructions, followed the rule announced by this court in Belmont v. Jones House Furnishing Co. and Hollenberg Music Co. v. Berry, supra. We believe that the rule announced in these cases is in accord with the weight of authority in this country, though we are free to confess that there is great conflict in the adjudicated cases. In 9 Cyc. p. 571, it is said: "In the United States, while some courts have followed the English rule, most of the courts have taken a different view, and have held that the mere knowledge of the seller of goods or services, or of the vendor or lessor of property, that the buyer intends an illegal use of them is no defense to an action for the price or for rent." From such research as we have been able to give, we are of the opinion that this is a correct statement. See Ralston v. Boady, 20 Ga. 449; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Almy v. Greene, 13 R. I. 350. One of the most exhaustive and thoroughly considered cases in this country is that of Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, where the authorities in the opinion and in the dissenting opinion are extensively reviewed. In that case the court said: "We are bound to look at the contract alone. Quite unimportant are subsequent transactions growing out of it. The contract was ended when Stewart delivered the goods, and subsequent dealings with the property by Emmerson and others, either in furtherance of or contrary to the original design of the purchaser, cannot relate back to the original sale, and make that illegal which at the conclusion of the original contract was not illegal." So here the contract of lease was

complete when the parties agreed upon the price to be paid, the time the premises were to be occupied, and when possession thereof was taken under the contract. Although the lessor may have had knowledge that the premises would be used for an immoral purpose, unless, coupled with that knowledge, there was an intention on his part when he executed the lease that the premises should be used for such immoral purpose, the lease contract would not be void. Unless there was a common intent on the part of the lessor and the lessee at the time the contract was made that the leased premises should be used for the unlawful purpose indicated, the contract would not be against public policy and void. The lessor is not the keeper of the conscience of the lessee, and has no police control over him in such matters, and mere knowledge on the lessor's part that the lessee is going to use the premises for an unlawful purpose does not make the lessor a participant in that purpose; for mere knowledge that the lessee may or will use the premises for an unlawful purpose is not of itself sufficient to show that the lessor intended that they must or shall be so used. The lessee might change his mind and use the leased premises for a lawful purpose. If he did not do so, but proceeded to put the premises to an unlawful use, then the lessor might sue in equity to restrain the unlawful use, but he could not forfeit the lease. See 18 A. & E. Enc. L. 379. The lease contract is good, unless as stated, the intention of both parties in making it is that the premises shall be used for the unlawful purpose. In the case of Armstrong v. American Exchange Bank, 133 U. S. 469, 10 Sup. Ct. 461, 33 L. Ed. 747, the court says: "An obligation will be enforced, although indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case"—citing a number of authorities. The appellee did not require the aid of the illegal use of the property to enable him to recover on the lease contract. The consideration for that was independent of the illegal use to which the premises were afterwards devoted. See Armstrong v. American Exchange Bank, supra.

The judgment is affirmed.

HART and KIRBY, JJ., dissenting.

NOTE.—*Evidence of Participation by Vendor in Vendee's Intent to Devote Goods to Unlawful Purpose.*—The general rule stated in the principal case seems abundantly supported, but there are cases to the contrary, which we refer to, along with other cases which show that participation to work invalidity need not be particularly active. It may be inferred from the nature of the transaction—all being necessary is to show a joinder by the vendor in the intent of the vendee.

In Reed v. Brewer, 90 Tex. 144, 37 S. W. 418, the court said it would express no opinion as to whether mere knowledge that furniture was purchased to be used in a house of prostitution and that purchaser had no other means of paying for the same than the proceeds of her immoral vocation would bar recovery therefor, but it thought, that where it was sold on open account without security and to be paid for in weekly or monthly instalments as might be realized from such vocation, it was deducible from the evidence that the seller was actually aiding and abetting the purchaser's business and a judgment for non-recovery would be affirmed.

The Texas Court of Civil Appeals in the same case, affirmed as seen *supra*, said: "We have not gone to the extent of holding that the selling of goods with the knowledge that the buyer will make an illegal use of them is sufficient to deprive the vendor of the right of enforcing payment, although there is high authority for that doctrine. Hannauer v. Doane, 12 Wall. 342. Without going to that extent, we do hold that when the vendor is a sharer in the illegal transaction, and knowingly obtains the profits arising from it, he cannot recover." S. C., 36 S. W. 99.

It is perceived, we think, that the Supreme Court says this last question is open, but that, at least, the surrounding facts may be looked into to ascertain whether there was an aiding and abetting.

The case of Hannauer v. Doane, *supra*, is also cited by the principal case merely as qualifying what it calls the general rule. It is true that the facts of that case could have been decided, as it was decided, by recognizing as a general rule what the principal case states to be such, as the goods sold were intended to be used in assisting the Confederate Army in its effort to overthrow the Government of the United States. But Mr. Justice Bradley, in commenting upon an expression of the same supposed rule, said: "In our judgment it is altogether too narrow a view of the responsibility of a vendor in such a case as the present. Where to drew the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act injurious to society or to any of its members. This is all that we mean to decide in this case." If that language does not mean that whether the criminal act be a felony or a misdemeanor, Mr. Justice Bradley was this time, at least, very inexact in the formulation of a proposition about which he says there is certainty of view. And why should there be any distinction as to the degree of criminality as to

acts which are injurious to society, so far as contracts are or not against public policy?

In Adams v. Coulliard, 12 Mass. 107, it is pointed out that it was formerly held in Massachusetts that knowledge merely of the illegal design—without more—would not defeat recovery as held by McIntyre v. Parks, 3 Met. 207, and that decisions in England establish the rule that the sale of a thing in itself a proper article of commerce is void, when the seller knows it is intended to be used for an immoral or illegal purpose, citing Cannon v. Bryce, 3 B. & Ald. 179; Benjamin on Sales, 383.

Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, is a very elaborate discussion in majority and minority opinions. The prevailing opinions sums up the matter as follows: "The validity of the plaintiff's claim to recover the price of goods sold, with knowledge that the purchaser intends to make an illegal use of them, depends upon the circumstances whether or not the original vendor participated actively, to a greater or less extent, in the subsequent unlawful disposition of the goods, or whether the expectation of advantage to him, growing out of the unlawful disposition of the goods by the purchaser, entered into and constituted a part of the inducement and consideration of the original sale." Thus it is seen there are two alternatives of voidableness. Of course, the inducement of sale of furniture to the keeper of a house of prostitution might be, that her vocation would be successfully prosecuted afforded a basis for credit, but that does not seem what is meant in the excerpt we have quoted. The dissent went upon the broad theory "that in all cases where one man furnishes another with the means to commit a crime, knowing that they are to be so used, the law deems him a participant in the guilt of the offense."

A later case in New Hampshire shows that active participation by vendor so as to make the sale void may be deduced from very slight circumstances. Thus where liquor was ordered for a purpose known to be unlawful, and directions were given to put it up in a designated manner or form, the manifest object of which was to aid in the unlawful disposition, the vendor complying with such directions participated in the unlawful purpose and was held not entitled to recover for the liquor. Skiff v. Johnson, 57 N. H. 475.

In a note to State v. Wilson, 73 Kan. 343, 84 Pac. 731, found in 117 Am. St. Rep., beginning on page 493, a great abundance of authority is cited to the proposition that "it is quite generally held that the mere knowledge of the seller of goods or of the lessor of property that the goods or property are to be used for immoral or illegal purposes is no defense to an action for the price of rent." But cases show that the court will seize on the least circumstance to show there was participation by the vendor in the intent of the vendee. Thus in Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 62 Pac. 145, 51 L. R. A., 889, 73 Am. St. Rep. 960, a distinction was drawn between vendor in a conditional sale contract and an absolute sale, where the vendee intended with the knowledge of vendor to use furniture in conducting a house of prostitution. It was said: "It is clear that the relation between the parties to the contract in the present case was something more than debtor and creditor, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it deemed itself insecure.' * * * This practically left the control of the use of the property with the appellant; and as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to perceive why it did not aid and participate in that immoral and illegal use." Here guilt is constructed out of a contract that generally is lawful and valid. Simply reserving power to put an end to the use for an unlawful purpose was held to invalidate the sale.

The courts seem yet to theorize about this matter each in its own way and the cases on the subject are legion—especially numerous being those relating to sale of liquor. C.

CORRESPONDENCE.

THE CAMPAIGN FOR INCREASE OF MEMBERSHIP IN THE AMERICAN BAR ASSOCIATION.

July 17, 1912.

My Dear Mr. Robbins:

Your favor of the 17th instant just received. I am enclosing you one of the new folders which may give you some very good data as news for your readers.

The first invitation sent out for applications was about the 10th of May. The first application received by the Committee was on the 13th of May. Since then we have received over four hundred applications and every mail is bringing in additional ones.

We are just ready to send out a second invitation which will cover a very much larger field than the former. The list that we will now send out will go to the members of the State Bar Associations of about sixteen states, the members of the Local Councils of that many states being willing to vouch for all on their particular roll of members excepting a few names furnished me in confidence from whom the invitations will be withheld.

You will note from the enclosed folder that we have quoted as liberally as our space would allow from your article of May 17th. I believe that you struck the keynote of the campaign when you suggested that it might be "considered as derogating from a lawyer's ethical standing in the profession to refuse, without reason, to contribute his influence to the common cause." You will note that that thought was followed in "The Green Bag" article from which I have quoted.

A great many individuals and even some newspaper editorials have criticised lawyers as a class, saying they are unpatriotic, and figures have been quoted showing the doctors as a class are better organized and wield a greater power and influence than lawyers, I am inform-

ed that they have about 40,000 in their American Medical Association, while the American Bar Association, with the efforts I have been able to devote, have just barely passed the 5,000 mark.

If you have any views on that or make the same deduction I will take a great pleasure in reading them. Personally, I feel that the lawyers have just begun to realize the necessity of organization and this realization has come since questions of "Reform of Legal Procedure," "Recall of Judges," "Recall of Judicial Decision," etc., have been thrown into politics. Both the friends and foes of proposed recalls and reforms have kicked the lawyers and blamed them for the ills which must be conceded by all fair minds to exist.

If I can receive the same percentage of returns from the new members to whom I am sending invitations that I received from the other new list I prepared, I will break all records for new members in the American Bar Association, and am anticipating bringing the membership up to the 7,000 mark.

Cordially yours,

CHARLES J. O'CONNOR.

PONTIUS PILATE AND THE RECALL.

Editor Central Law Journal:

Senator Owen, in the Central Law Journal of July 12th, thinks he has forever silenced the objection sometimes made to the recall of judges, by people who say that sometimes the multitude err. And he inveighs loudly against poor, old Pilate for yielding to the cry which called upon him to deliver Barabbas, the robber, and to crucify Christ. However, he says it was the cry of the Chief Priests who demanded this. His quotations would seem to prove his case; but as is usual with such reactionaries against all the experience of the past he omits the very passage of Matthew's account of this matter, which proves his argument of no account. "But the Chief Priests and Elders persuaded the multitude that they should ask Barabbas, and destroy Jesus." (Matt. XXVII, 20). In the verses following when Pilate asked again which of the twain he should release they cried out Barabbas. And when he asked again what he should do with Jesus, and asked what evil he had done, "they cried out the more, saying let him be crucified." The Senator says the people followed Him. Yes, they probably repented as did Judas and Pilate. But the tumult that Pilate feared (verse 24) was not a tumult of the chief priests, for they were few, but of the multitude. The whole account shows that this multitude, though they had eaten of the loaves and fishes, and had followed Him, they were persuaded by the loud-mouthed chief priests, and were turned for the moment against Christ, and demanded his blood.

There is small wonder that these same loud-mouthed, so-called "friends of the people" would like to do away with this feature of this solemn account. But the verse I have cited conclusively shows it was the multitude, and that they "were persuaded" to do this thing.

J. C. M.

Salem, Oregon.

BOOK REVIEWS.

JOHNSON AND HUEBNER ON RAILROAD TRAFFIC AND RATES.

Probably the most authoritative, practical work on railroad traffic and rate-making is this monumental work of the two famous professors of the University of Pennsylvania. No one should attempt to discuss the subject of rate-making much less have anything to do with making laws fixing rates until he has read this work. Lack of proper information relative to the subject-matter of legislation is what so often brings our laws into contempt. The fixing of a railroad rate is one of the most complex problems of our modern civilization. It cannot be learned in a day, nor can impassioned impulse take the place of such knowledge.

This book has been writen mainly to meet the demand of men in the railway service for complete and authentic information regarding traffic services and rate systems. It is not an attack upon railroads, nor a defense of them. It is an exhaustive account of the intricate and detailed work connected with railroad traffic and rate-making. It is not the result of a few months' labor. The authors have given the subject years of study, and have received information and advice from many prominent railway officials and other traffic experts. The volumes are thus written by university professors with the assistance of practical railway men.

Printed in two volumes, bound in red silk and published by D. Appleton & Co., New York.

HUMOR OF THE LAW.

"Papa," asked a little boy, "what is a legal blank?"

"A legal blank, Johnny," replied his father, "is a lawyer who never gets a case."—Exchange.

An Indiana assessor had trouble getting people to list dogs for taxes.

"Got a dawg?" he asked.

"No," was the answer.

"Well, I'll 'sess you one anyway—not my fault if hain't got any—plenty of dawgs."—Success Magazine.

Mayor Duley of Little Rock, in an interesting address on municipal sanitation, said:

"We'd make faster progress in improving the health of our cities if we didn't meet with so many foolish objections.

"One man, for instance, will object for religious reasons to the extermination of noxious insects. They're here, he will say; hence they must be here for some good purpose.

"It's all very laughable.

"Why, a workman in a Little Rock car said the other day to his neighbor:

"'I see the health board is after spitters.'

"'Then, by gosh,' said his neighbor, 'how's a feller goin' to git a grip on his shovel?'"—Minneapolis Journal.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Assignments for Benefit of Creditors**—Mortgage.—An instrument executed by a debtor to secure a bona fide indebtedness is a mortgage, and not an assignment for the benefit of creditors, where it does not cover or purport to cover the debtor's entire estate.—Williamson v. Bitting, N. C., 74 S. E. 808.

2. **Assistance, Writ of**—Restoration.—Where a purchaser of land went int possession before the commencement of a foreclosure suit, to which he was not made a party, and was dispossessed by a writ to the sheriff issued in that suit, his petition for a writ of assistance to restore to him the possession of the land should be granted.—Long v. Morris, Ala., 58 So. 274.

3. **Attorney and Client**—Lien.—If a judgment debtor pays an attorney the amount of his claim of lien without the consent of the owner of the judgment, the burden is on the judgment debtor as against the owner of the judgment to prove the validity of the attorney's lien.—Hume v. Peterson, Neb., 135 N. W. 1013.

4. **Bankruptcy**—Pleading.—The want of authority of a trustee in bankruptcy to sue to set aside assignments by the bankrupt of life policies need not be pleaded as an affirmative defense, where the bill shows that he has no authority to sue.—Security Trust Co. v. Glazier, Mich., 135 N. W. 904.

5.——Preference.—Bankruptcy Act, § 47, as amended by Act June 25, 1910, § 8, held not to authorize a trustee in bankruptcy to recover land conveyed by the bankrupt prior to the adjudication in bankruptcy on the mere ground that the deed has not been recorded.—Sparks v. Weatherly, Ala., 58 So. 280.

6. **Banks and Banking**—Trust Funds.—Bank with whom guardian deposited, in his own name, check to him as guardian, held not liable, where it subsequently paid the deposit to him and he embezzled it.—United States Fidelity & Guaranty Co. v. First Nat. Bank of Monrovia, Cal., 123 Pac. 352.

7. **Bills and Notes**—Days of Grace.—Where, when a note became due, the law of the forum allowed days of grace, but, before action on the note, the law was repealed, the former law, and not the law at the time of the trial, governed.—Dunbar v. Commercial Electric Supply Co., Okla., 123 Pac. 417.

8.——Illegality.—A note is void, if part of the consideration involves violation of a penal statute.—Long v. Holley, Ala., 58 So. 254.

9.——Negotiability.—A note secured by mortgage is nonnegotiable.—Helmer v. Parsons, Cal., 123 Pac. 356.

10.——Pleading.—In an action on a note, the plea that the note of which plaintiff was transferee had been paid to the original payee with the knowledge of plaintiff was good, as against an oral motion to strike, though it might have been bad on special demurrer.—Netherland v. First Nat. Bank of Louisville, Ga., 74 S. E. 849.

11.——Usury.—In an action on notes, it was a good plea that they were transferred by payee to plaintiff as collateral, and that the collateral debt bore usurious interest, or was usuriously discounted, and that before suit defendant paid the notes without knowing that they had been transferred.—Stewart v. Bibb County Banking & Trust Co., Ala., 58 So. 273.

12. **Brokers**—Revocation.—Where the authority is without time limit, it may be revoked at any time.—Maddox v. Harding, Neb., 135 N. W. 1019.

13. **Carriers of Goods**—Contract.—Where goods are received and actually shipped under a parol contract, the subsequent receipt of a bill of lading does not prevent the shipper from relying on the parol contract.—Williams v. Louisville & N. R. Co., Ala., 58 So. 315.

14.——Terminal Carrier.—Plaintiff, having contracted for the transportation of fruit with defendant terminal carrier, gave the initial carrier orders on its blanks for the shipment of the goods routed over defendant's line, and thereafter accepting receipts or bills of lading which plaintiff's agent testified was a mere matter of form, and given, as he supposed, pursuant to the contract with defendant. Held, that the contract with defendant was not thereby abandoned or modified as a matter of law, so as to preclude recovery against the terminal company for loss of the fruit.—Catanzaro v. Pennsylvania R. Co., Pa., 83 Atl. 64.

15. **Carriers of Live Stock**—Evidence.—Under allegations of complaint that the stock was not "safely" carried, but was injured by defendant's negligence, evidence as to quality of hay and water furnished by defendant held within the issues.—Heitman v. Chicago, M. & St. P. Ry. Co., Mont., 123 Pac. 401.

16. **Chattel Mortgages**—Breach of Condition.—A chattel mortgagee has such a qualified ownership of the property that after breach of the

condition he may maintain replevin, but he must prove his ownership by proving a valid or subsisting debt or other consideration for the mortgage.—Dose v. Beatie, Oreg., 123 Pac. 383.

17.——Construction.—Contracts for the conveyance of personal property should be construed according to the intention of the parties, and, where their character is in doubt, equity will construe the instrument as a mortgage rather than a conditional sale.—Andre v. Murray, Ind., 98 N. E. 322.

18. **Commerce**—Convict-made Goods.—Convict-made goods are lawful subjects of commerce.—In re Opinion of the Justices, Mass., 98 N. E. 334.

19. **Common Law**—English Decision.—A decision of the English High Court of Chancery, rendered in 1798, is not binding on the Maryland courts as authority.—Dudrow v. King, Md., 83 Atl. 34.

20. **Contracts**—Mutuality.—A contract, reciting "that whereas * * * first parties agree to furnish * * * a reasonable quantity of goods," is not unenforceable for lack of mutuality, where the first parties actually furnish the goods.—Krausse v. Greenfield, Oreg., 123 Pac. 392.

21.——Mutuality.—A contract of employment, though in its inception lacking the mutuality to constitute a valid contract, is binding in so far as it has been performed by the employee.—Little Butte Consol. Mines Co. v. Girand, Ariz., 123 Pac. 309.

22.——Right of Action.—One cannot make a contract a basis of recovery, if he has broken it himself.—Williams v. Wright, Wash., 123 Pac. 446.

23. **Corporations**—Action by Stockholders.—Demand on a corporation to bring action against directors for fraud was not a condition precedent to stockholder's action, where defendant directors dominated the board.—Robinson v. De Luxe Motor Car Co. of New Jersey, Mich., 135 N. W. 897.

24.——Promoters.—The liability of persons who organize a corporation and transact business in its name before the minimum capital stock has been subscribed for, is to creditors, and is not an asset of the corporation, and cannot be enforced by a suit by a receiver.—Rigbers v. Hathcock, Ga., 74 S. E. 834.

25. **Courts**—Precedents.—In determining a question without the guidance of precedent in the same court, a court must adopt the rule which in its opinion agrees with the habits and customs of the people, and which will, in the majority of cases, be conducive to a settlement of disputes of such character according to right.—Wicker v. Jones, N. C., 74 S. E. 801.

26. **Damages**—Measure of.—The measure of damages for injury to a servant is such sum as will reasonably compensate him for his injury, including his pain in the past and such as may result in the future, as well as for lost time and wages and impairment of earning capacity.—Seininski v. Wilmington Leather Co., Del., 83 Atl. 20.

27.——Measure of.—Rental value is a proper measure in ascertaining damages for loss by delay in the operation of a mill.—Wilson v. Guyandotte Timber Co., W. Va., 74 S. E. 870.

28.——Liquidated.—A stipulation for liquidated damages cannot be construed as a penalty when the court finds the actual damages to exceed the amount stipulated.—Krausse v. Greenfield, Oreg., 123 Pac. 392.

29. **Death**—Asset of Estate.—The survival act applies to rights of action as well as to actions, and under that act the right of action which vests in the injured person becomes, upon his death, an asset of his estate, to be collected and distributed according to the administration statutes.—Love v. Detroit, J. & C. R. Co., Mich., 135 N. W. 963.

30.——Damages.—An administratrix suing under the Survival Act for her husband's death held entitled to recover such sum as was spent in medical attendance on deceased.—Gates v. Beebe, Mich., 135 N. W. 934.

31.——Self-Defense.—Where, in an action for the death of the plaintiff's intestate, the defendants justified as deputy sheriffs on the ground of self-defense, the writ under which they were acting at the time was properly admitted on the question of who was in the wrong in bringing on the difficulty.—Wise v. Curl, Ala., 58 So. 286.

32.——Wantonness.—A killing may be wanton, though not intentional, since, where it results from gross carelessness, the natural consequences of the reckless act will be presumed to have been intended.—Central of Georgia Ry. Co. v. Pelfry, Ga., 74 S. E. 854.

33. **Descent and Distribution**—Deed by Heir.—As a rule, one who holding by descent conveys his title away holds by purchase, and not descent upon a reconveyance to him.—Dudrow v. King, Md., 83 Atl. 34.

34. **Divorce**—Alimony.—The authority of the circuit court in chancery to modify a decree of divorce so far as it awards alimony to the wife is statutory.—Pingree v. Pingree, Mich., 135 N. W. 923.

35.——Contempt.—Where the failure of a defendant in divorce to pay temporary alimony ordered by the court is due to his inability to comply with the order, it is error to commit him to jail for an indefinite period for contempt.—Davis v. Davis, Ga., 74 S. E. 830.

36.——Modification of Decree.—Where a husband in divorce asked to be adjudged owner of a half interest in land purchased with his own money and that advanced by the wife, with the understanding that her advancement was to be a lien, a decree fixing the amount of the lien at less than one-half the money advanced should be modified to conform to the pleadings.—Short v. Short, Oreg., 123 Pac. 388.

37.——Sporadic Quarrels.—Sporadic quarrels or disagreement between spouses in which both are equally guilty are not grounds for divorce.—Sneed v. Sneed, Ariz., 123 Pac. 312.

38. **Ejectment**—Equity.—The original absence or subsequent failure of consideration for a mortgage cannot be proved in an action of ejectment, but resort must be had to equity to attack the mortgage on this ground.—Brown v. Loeb, Ala., 58 So. 330.

39. **Election of Remedies**—Estoppel.—Where a party has, under the law, two remedies and proceeds under one, he cannot, after obtaining a decision thereunder, abandon that remedy and proceed under the other.—Bernhard v. Idaho Bant & Trust Co., Idaho, 123 Pac. 481.

40. **Embezzlement**—Promissory Note.—A note is property, which may be the subject of embezzlement from the payee by the maker, though the indebtedness evidenced thereby be not affected by the act.—People v. Gregg, Mich., 135 N. W. 970.

41. **Eminent Domain**—Public Use.—A "public use" is defined as any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities.—Mueller v. Supervisors of Town of Courtland, Minn., 135 N. W. 996.

42. **Equity**—Laches.—The circumstances of each case must govern in determining the sufficiency of laches to constitute a defense, and, while lapse of time is an important element, it is not controlling, and the court should give due regard to surrounding circumstances.—Bergen v. Johnson, Idaho, 123 Pac. 484.

43.——Multifariousness.—A bill, though containing various matter, is not multifarious, if the subject-matter of each claim is substantially the same, so that they may be conveniently considered together.—City of Pittsburg v. Pittsburg Rys. Co., Pa., 83 Atl. 67.

44. **Estates**—Merger.—The rule that, where legal and equitable titles meet in the same person, the equitable title is merged in the legal title, is subject to the restriction that the merger takes place only where the estates are coextensive.—Wilson v. Linder, Idaho, 123 Pac. 487.

45. **Evidence**—Admissibility.—A shipper's claim for damages for the negligent carriage of live stock, presented to the carrier on arrival, before action, is admissible in a subsequent action for damages.—Heitman v. Chicago, M. & St. P. Ry. Co., Mont., 123 Pac. 401.

46.——Adverse Presumptions.—Where a party has an opportunity to know material facts and fails to testify on the question, every inference should be indulged against him thereon.—Jenner v. Shope, N. Y., 98 N. E. 325.

47.——Judicial Notice.—The Supreme Court will take judicial notice that it is the custom of electric railway companies to equip the cars with fenders in order to protect the public on the streets—Love v. Detroit, J. & C. R. Co., Mich., 135 N. W. 963.

48.——Parol Testimony.—It is competent to show by parol that the consideration for a written contract is in fact different from the one expressed therein.—Doan v. Cleveland, C., C. & St. L. Ry. Co., Ind., 98 N. E. 321.

49.——Presumption.—Where a letter has been duly addressed, stamped and posted, it is presumed to have been received by the addressee, though such presumption may be rebutted by proof.—City of Pincho v. Janey, Neb., 135 N. W. 1044.

50.——Presumption.—Where it is shown that a partnership at one time existed, it will be presumed to continue, in the absence of testimony to the contrary.—Cobb v. Martin, Okla., 123 Pac. 422.

51. **Executors and Administrators**—Actions by.—An action to cancel a contract for the sale of real estate and to quiet title thereto is properly brought in the name of the vendor's executor.—Smith v. Stiles, Wash., 123 Pac. 448.

52.——Parties.—An executor or administrator in actions affecting decedent's personal property is the proper party to prosecute or defend, but an exception to the rule permits an heir or legatee to appear to protect his own rights, where there is collusion with the legal representative of decedent.—Rine v. Rine, Neb., 135 N. W. 1051.

53. **Frauds, Statute of**—Parol Gift.—A parol gift of coal land by a father to a son, followed by exclusive possession and the making of improvements, held not within the statute of frauds.—Greenwich Coal & Coke Co. v. Learn, Pa., 83 Atl. 74.

54.——Sufficient Writing.—An agreement for the sale of coal lands, which fails to definitely describe any of the boundaries, is void and unenforceable under the statute of frauds.—Safe Deposit & Trust Co. of Pittsburg v. Diamond Coal & Coke Co., Pa., 83 Atl. 54.

55. **Fraudulent Conveyances**—Evidence.—While relationship between the parties may raise a suspicion, it does not establish fraud.—Reid v. Hennessy Mercantile Co., Mont., 123 Pac. 397.

56.——Preferring Creditor.—A debtor being entitled to prefer a creditor, the fact that a creditor taking goods in payment of a debt, knowing of the insolvency of the debtor, pays a balance in cash, is not conclusive of fraud, but only evidence thereof.—W. H. Frantz Stores Co. v. Wright, Colo., 123 Pac. 329.

57. **Guardian and Ward**—Constructive Notice.—When a guardian applies the assets of his wards to his individual debts, the one receiving the same with notice of the facts is liable therefor to the ward.—Steinhart v. Gregory, Ala., 58 So. 266.

58.——Equity—Equity will permit guardians to change the character of the property when manifestly for the benefit of the infant, or will ratify such change where it would have authorized it.—McCreary v. Billing, Ala., 58 So. 311.

59. **Husband and Wife**—Estoppel.—Where a husband permitted his wife to acquire property in her name, and by his conduct ratified the sale, he cannot be heard to set up that the title was in another than the vendor.—Latour v. Guillory, La., 58 So. 341.

60.——Suretyship.—A married woman, who executes a mortgage reciting her individual indebtedness, has the burden of proving that it was given merely as surety for her husband, and invalid.—Lamkin v. Lovell, Ala., 58 So. 258.

61. **Infants**—Equity.—Equity has jurisdiction to decree the sale of infants' realty, whether for purposes of maintenance and education or reinvestment, and whether estate is one in possession or future estate.—McCreary v. Billing, Ala., 58 So. 311.

62. **Insurance**—Iron-safe Clause.—Production by a small country merchant of an inventory taken within two months of loss, of a book, showing purchases, another showing cash, and a third showing credit sales, sufficiently meets the requirements of the "iron-safe clause."—J. B. Clark & Sons v. Franklin Ins. Co., La., 58 So. 345.

63.——Waiver.—An insured who breaches the "iron-safe clause" of policy cannot recover for loss of the merchandise insured, unless the insurer waives the breach.—Chamberlain v. Shawnee Fire Ins. Co., Ala., 58 So. 267.

64. **Interest**—Wrongful Delay.—Where a purchaser made a demand for an unreasonable reduction from the purchase price as a condition to his paying the same, and thereby caused long delay and litigation, the vendor was entitled to interest.—McCowen v. Pew, Cal., 123 Pac. 354.

65. **Judgment**—Collateral Attack.—There was no presumption on collateral attack in support of an attempted decree of insolvency showing on its face that it was rendered several years after the probate court had lost jurisdiction of the administration.—Medley v. Shipes, Ala., 58 So. 304.

66.——Collateral Attack.—A judgment rendered without service of summons on defendant and without his appearance may be attacked either by motion in the action to set aside the judgment or by a suit in equity to have the judgment set aside or its collection enjoined.—Bernhard v. Idaho Bank & Trust Co., Idaho, 123 Pac. 481.

67.——Injunction.—The circuit court of county in which garnishee's property was seized and in which he resided could enjoin the enforcement of the judgment, though taken in another county.—Steele v. Bliss, Mich., 135 N. W. 931.

68.——Process.—If process is served on the person to be sued, though the wrong name is given, and he suffers a default, or omits to plead misnomer, he is concluded by the judgment, and in future litigations may be connected with the judgment by proper averments.—Jones v. Knosp, Neb., 135 N. W. 1049.

69.——Warrant of Attorney.—Power to confess judgment by warrant of attorney is exhausted by entering judgment thereon, and a second judgment on the same warrant, after vacation

of the first is void.—Borough of Bellevue v. Hallett, Pa., 83 Atl. 66.

70. **Libel and Slander**—Imputing Malice.—The court must judge a man's intent in an act by the means he employs and the thing to be accomplished, and, if they are all lawful, the court cannot impute malice or unlawful motives.—Barton v. Rogers, Idaho, 123 Pac. 478.

71. **Life Estates**—Joinder of Parties.—A life tenant, not in possession of property covered by a void deed, cannot be joined as a co-complainant with the remaindermen in a bill against the grantee in possession to declare the deed void. —Lewis v. Alston, Ala., 58 So. 278.

72.——Enlargement.—Where a life estate only is expressly given to the first taker with power of disposition for a specified purpose, the life estate is not enlarged into a fee, and the limitation over is valid.—Luscomb v. Fintzelberg, Cal., 123 Pac. 247.

73.——Payment of Liens.—Though a life tenant and his successors in interest are bound to pay taxes, they cannot by payment acquire adverse rights against remaindermen; and the duty of payment does not rest on a lessee from the life tenant.—Wilson v. Linder, Idaho, 123 Pac. 487.

74. **Master and Servant**—Action for Salary.—The burden of proving that a discharged servant did not make reasonable efforts to obtain employment elsewhere is on the master.—Coates v. Allegheny Steel Co., Pa., 83 Atl. 7.

75.——Nondelegable Duty.—An employer cannot delegate his primary duties, such as that of furnishing safe appliances.—Seininski v. Wilmington Leather Co., Del., 83 Atl. 20.

76.——Safe Appliances.—A servant may rely on the master's furnishing of safe appliances, and assumes no risk of injury because of defects therein.—Spahn v. People's Ry. Co., Del., 83 Atl. 27.

77. **Mortgage**—Deed.—Where an instrument in the form of a deed of conveyance is executed as security for a debt, it becomes a mortgage, and not a deed.—Bergen v. Johnson, Idaho, 123 Pac. 484.

78.——Wrongful Foreclosure.—A mortgagor, deprived of his land by foreclosure by an innocent purchaser under a mortgage which was to take effect only under certain conditions which never came about, could recover the value of the land from the mortgagee.—Garrison v. J. I. Case Threshing Mach. Co., N. C., 74 S. E. 821.

79.——Personal Liability.—The fact that plaintiff held a mortgage on the premises covered by defendant's mortgage which was prior to defendant's mortgage did not make defendant plaintiff's debtor, or impose any personal liability on him to plaintiff.—Loosen v. Schissler, Wisc., 135 N .W. 1008.

80.——Place of Contract.—A note and mortgage, executed and payable in Alabama on land in Mississippi, are governed by the laws of Alabama, where the parties reside.—Lamkin v. Lovell, Ala., 58 So. 258.

81.——Surrounding Circumstances.—The relations between the parties at the time of its execution may be considered in determining whether a conveyance of land, absolute on its face, was intended as a mortgage to secure a debt.—Elliott v. Connor, Fla., 58 So. 241.

82. **Municipal Corporations**—"Look and Listen."—The "look and listen" law, as applicable to railroads, is not applicable to injuries by automobiles of pedestrians on streets; but drivers on streets and pedestrians, each recognizing the rights of the other, are both required to exercise ordinary care.—Barbour v. Shebor, Ala., 58 So. 276.

83.——Nuisance.—Where a fruit stand, maintained on a public sidewalk adjacent to the store of plaintiff, is a public nuisance, and obstructs the free ingress to and egress from his store by him, his employees and customers, he may sue to abate the nuisance.—Cassimus v. Levistein, Ala., 58 So. 280.

84.——Shade Trees.—The courts will restrain the unnecessary destruction by a city of trees belonging to private owners and not constituting a nuisance, though, if the general plan of street improvement requires that shade trees be destroyed, the city cannot be enjoined from destroying them.—Mayor and Council of City of Easton v. Turner, Md., 83 Atl. 42.

85. **Navigable Waters**—Boom Companies.—Under ordinary circumstances a boom company has no right to use all of the surface of the river below its boom to the exclusion of others, and one kept from the use of the river thereby may have action for the injury.—Wilson v. Guyandotte Timber Co., W. Va., 74 S. E. 870

86. **Negligence**—Child.—A child between five and six years old cannot be charged with contributory negligence.—Love v. Detroit, J. & C. R. Co., Mich., 135 N. W. 963.

87.——Imputability.—One riding in an automobile with its owner, who was driving, was chargeable with the contributory negligence of the owner.—Kneeshaw v. Detroit United Ry., Mich., 135 N. W. 903.

88.——Presumption.—The presumption that one killed by another's negligent act was not himself guilty of contributory negligence is only available in absence of direct testimony on the subject.—Gates v. Beebe, Mich., 135 N. W. 934.

89. **Partnership**—Estoppel.—Parties who have admitted that they are in partnership, either by express statements or by conduct, will be held to that admission.—Cobb v. Martin, Okla., 123 Pac. 442.

90.——Receivership.—Where a receiver of a firm continued the business with the consent of the firm creditors and incurred debts, the creditors of the receiver were entitled to priority.—Ivie v. Blum & Bitting, N. C., 74 S. E. 807.

91. **Perjury**—Burden of Proof.—The state on a trial for perjury must show that the alleged false testimony was in fact given at the time and place on an issue joined in a matter material to the issue.—Wilde v. State, Wyo., 123 Pac. 85.

92.——Evidence.—The state on a trial for perjury based on false testimony in support of an alibi relied on by a third person on his trial for assaulting a female need only prove that the presence of the third person at the time and place of the alleged assault was in issue on the trial of the assault case, and that accused's testimony on that issue was false.—Fletcher v. State, Wyo., 123 Pac. 80.

93. **Perpetuities**—Suspension of Alienation.—Direct devises which vest at the death of one entitled to a life estate in the income of the property are not void because of undue suspension of the power of alienation, because among the takers there may be a child en ventre sa mere.—In re Spreckels' Estate, Cal., 123 Pac. 371.

94. **Principal and Agent**—Apparent Authority.—The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question for the jury.—Wrought Iron Range Co. v. Leach, Okla., 123 Pac. 419.

95.——Liability.—One who agreed to pay an interpreter for his services in carrying on negotiations with another, who spoke a different language, made the interpreter his agent in the negotiations, so as to be liable for material misrepresentations by him.—Bonelli v. Burton, Ore., 123 Pac. 37.

96. **Quieting Title**—Burden of Proof.—A suit to quiet title by a grantee against a purchaser at a sale under execution against the grantor is a suit in equity, in which the purchaser has the burden of proof that the conveyance to the grantee is fraudulent as against creditors of the grantor.—Reid v. Hennessy Mercantile Co., Mont., 123 Pac. 397.

97. **Railroads**—Violating Ordinance.—To run a street car over a crossing at speed in excess of that limited by statute or ordinance is negligence per se.—Lininger v. San Francisco, V. & N. V. R. Co., Cal., 123 Pac. 235.

98. **Religious Societies**—Title to Property.—Where a division occurs in a religious organization, the title to the property will remain in the old organization and those who adhere to the doctrines and tenets of the church as originally taught.—Apostolic Holiness Union of Post Falls v. Knudson, Idaho, 123 Pac. 473.

99. **Remainders**—Gift Over.—Where a gift over is limited to take effect on a particular

event and the opposite or alternative of that event happens, the subsequent gift fails, though the prior gift be out of the way.—Gunnings Estate, Pa., 83 Atl. 61.

100. **Sales**—Inspection.—Under an executory contract with an implied warranty, the buyer on arrival of the goods must inspect, and if he discovers defects and sells the goods at a reduced price, he is bound by the acceptance and must pay the contract price.—Columbus & Hocking Coal & Iron Co. v. See, Mich., 135 N. W. 920.

101.——Transfer of Title.—Where goods are identified, and the parties agree upon a present transfer, the fact that weighing or measuring is necessary to ascertain the price to be finally paid does not affect the question of the transfer of title.—Fiddyment v. Johnson, Cal., 123 Pac. 342.

102.——Repudiation.—A letter by the purchaser, informing the seller that it would not pay the balance due, but would hold it as indemnity for further shipments, and would make no further payments, unless the seller complied with the purchaser's requirements, held a repudiation of a contract of sale.—J. K. Armsby Co. v. Grays Harbor Commercial Co., Ore., 123 Pac. 32.

103.——Rescission.—A buyer rejecting an article for defects therein held bound, under the contract, to return it, freight prepaid; and hence, where he refused to return it, unless freight already paid was refunded, he was liable for the price.—Berlin Mach. Works v. Midland Coal & Lumber Co., Mont., 123 Pac. 396.

104.——Rescission.—Where a seller is not in possession of notes given for the price and cannot return them in case of rescission, he is not entitled to rescission.—Latour y. Guillory, La., 58 So. 341.

105.——Warranty.—Any positive affirmation of a matter of fact by the seller during the negotiations and as part of the contract, and relied on by the purchaser, is a warranty.—Woolsey v. Zieglar, Okla., 123 Pac. 164.

106. **Set-off and Counterclaim**—Recoupment.—Recoupment is the keeping back or stopping of something which is due, and could be invoked at common law when defendant had sustained damages from plaintiff's breach of the contract sued on; defendant's damages being abated from plaintiff's claim.—Krausse v. Greenfield, Oreg., 123 Pac. 392.

107. **Sheriffs and Constables**—Wrongful Levy.—In an action against a sheriff for a wrongful levy, a person claiming to have bought the property from the execution debtor must show that she was an innocent purchaser for a valuable consideration without notice.—Dose v. Beatie, Oreg., 123 Pac. 383.

108. **Shipping**—Charter Party.—A charter party carries an implied warranty by the owner that the ship will be in fit condition, in the absence of express stipulation to the contrary.—Revett v. Globe Navigation Co., Wash., 123 Pac. 459.

109. **Specific Performance**—Delay.—Right to specific performance of a contract to convey was not lost by delay in enforcing it and enhancement of the land's value in the meantime, where both parties were equally responsible for the delay.—Gainer v. Jones, Ala., 58 So. 288.

110.——Enforcement of.—Though parol evidence may be introduced to vary a written sale of land on the ground of fraud, accident, or mistake, and the contract reformed, it will not be specifically enforced.—Safe Deposit & Trust Co. of Pittsburg v. Diamond Coal & Coke Co., Pa., 83 Atl. 54.

111. **Telegraphs and Telephones**—Mental Suffering.—Damages for mental suffering are properly recoverable as actual damages in an action against a telegraph company for a failure to promptly deliver a message.—Western Union Telegraph Co. v. North, Ala., 58 So. 299.

112. **Trover and Conversion**—Defined.—Though generally, to be guilty of conversion of personalty, one must be in possession of it, yet, if he exercises acts of dominion and participates in the wrongful act of, the person in possession, he is guilty of conversion.—Continental Gin Co. v. De Bord, Okla., 123 Pac. 159.

113. **Trusts**—Resulting Trust.—Where children, who with the father were heirs of the deceased wife, conveyed to him the property, to enable him to make terms with one holding an incumbrance, a conveyance by him to certain of his own children cognizant was subject to a trust in favor of those excluded.—Winters v. Winters, Nev., 123 Pac. 17.

114.——Resulting Trust.—Where a husband and wife purchased land, the deed running to her, on the understanding that all profits were to be divided between them after a sum advanced by her had been repaid, held, that the husband, on obtaining a divorce, could enforce a resulting trust in the land subject to the wife's lien for the sum advanced.—Short v. Short, Ore., 123 Pac. 388.

115.——Title.—Trustees take only such estate as is commensurate with the necessities of their office; and hence, where the only duty of a trustee is to pay the income to one for her life, the trustee does not take a fee.—In re Spreckels' Estate, Cal., 123 Pac. 371.

116. **Vendor and Purchaser**—Option.—Option held to be an agreement that another shall have a right to buy at a fixed price and time, or a continuing offer to sell.—Gard v. Thompson, Idaho, 123 Pac. 497.

117.——Time of Essence.—Under a contract for sale of land in which time is of the essence, the vendee cannot, after forfeiture declared for default, by tender, acquire a right to recover back the money paid.—Skookum Oil Co. v. Thomas, Cal., 123 Pac. 363.

118. **Waters and Water Courses**—Consumers.—A consumer of water, having stolen a large quantity and then sued to restrain the shutting off of its supply, was properly required to pay for the amount stolen, pursuant to water company's cross-bill, and was then entitled to a decree for water in the future.—American Conduit Mfg. Co. v. Kensington Water Co., Pa., 83 Atl. 70.

119. **Wills**—Accumulating Income.—If part of the income of a trust estate is undisposed of by the will, the trustees should, in the absence of any provision whatsoever, accumulate it and pay it to those legatees who may be entitled to the original corpus of the estate.—Perry v. Brown, R. I., 83 Atl. 8.

120.——Consent by Infant.—An issue of devisavit vel non cannot be determined by consent of the parties, some of whom are infants.—Holt v. Ziglar, N. C., 74 S. E. 813.

121.——Executors and Trustees.—Where a will appoints the same persons as executors and trustees, their duties as executors and trustees are distinct; and until the estate is settled or distributed, in whole or in part, and the executors discharged, their duties as executors continue, and they do not assume the duties of trustees, and as such cannot interfere with the estate.—Jones v. Broadbent, Idaho, 123 Pac. 476.

122.——Legacy.—A legacy bears interest from the time it is payable under the terms of the will; the rule that interest runs from the expiration of a year from testator's death applying only when the will does not direct payment at a particular time.—In re Gunning's Estate, Pa., 83 Atl. 63.

123.——Nuncupative Will.—Probate of alleged nuncupative will will be denied, where the maker was competent to have asked another to have signed his name for him.—In re Mulhall's Estate, Pa., 83 Atl. 66.

124.——Undue Influence.—On an issue of undue influence, an instruction that frequent calling on testator by the beneficiary, together with activity about the execution of the will, excluding other persons from testator, and concealing the will after it was made, raised a presumption of undue influence, held erroneous.—Bretzman's Will, Minn., 135 N. W. 980.

125.——Revocation.—A cancellation or obliteration of a will does not operate as a revocation, unless it was done animo revocandi.—Safe Deposit & Trust Co. v. Thom, Md., 83 Atl. 45.